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IN THE
COURT OF APPEALS OF INDIANA

JEREMY L. SCHULIEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 90A02-0603-CR-161
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0506-FD-0062

November 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant, Jeremy Schulien, was convicted of Theft as a Class D felony.[1] Upon appeal, Schulien argues that the maximum three-year sentence imposed by the trial court is inappropriate.

We affirm.

At approximately 1:00 a.m. on June 8, 2005, Officer Robert Morgan of the Bluffton Police Department initiated a traffic stop of a car in which Schulien was a back seat passenger. During his inquiry of the driver and passengers, Officer Morgan observed a bundle of wires with black tape on them in the back seat, but thought nothing of it at that time. Approximately an hour after that traffic stop, Officer Morgan learned of a reported theft near where the traffic stop had taken place. The complainant reported that someone had broken into her locked car and had taken her purse, stereo, and camera. Suspecting the three individuals he had stopped earlier, Officer Morgan requested assistance in locating the vehicle he had stopped previously that night. Officer Sam Adams of the Fort Wayne Police Department eventually located the vehicle in a grocery store parking lot. Schulien and two others were standing beside it. After approaching the vehicle, Officer Adams could see in plain view a car stereo, a purse, and a camera. After receiving consent to search the vehicle, those items were seized. The car stereo was found on the floorboard behind the passenger seat, and the camera was found on the back seat.

On June 9, 2005, the State charged Schulien with theft as a Class D felony. Following a jury trial on January 17, 2006, Schulien was found guilty as charged. At a

[1] Ind. Code § 35-43-4-2 (Burns Code Ed. Repl. 2004).

sentencing hearing held on February 2, 2006, the trial court sentenced Schulien to the maximum term of three years incarceration.[2] In pronouncing the sentence, the trial court stated:

> "Mr. Schulien, let me start out by saying the sentence imposed today is not because you took the matter to trial and I appreciate your kind words about being a fair judge. The one thing that is very difficult for the court is you try to look at the defendant and you try to look at the criminal act and that sort of thing and come up with a sentence that I feel is just but part of that too is over twenty-five (25) years I have sentenced more people than I want to . . . even think about and there has to be some consistency between the sentences that are [meted] out so that there is some reliability to the community and the attorneys and the defendants pretty much know where the court has been and where I'm coming from in any particular sentence and my decision this afternoon is going to be that you be sentenced to the Indiana Department of Correction for a period of three (3) years . . . and the primary reason Mr. Schulien . . . someone with three felonies and three misdemeanors coming in front of me is going to get the maximum time." Sentencing Tr. at 11-12.

Upon appeal, Schulien argues that the sentence imposed is inappropriate. Schulien first asserts that the nature of the offense does not warrant the maximum sentence. Schulien points out that he received a sentence within the range for a Class C

[2] Effective April 25, 2005, the General Assembly made sweeping changes to the sentencing statutes in response to our Supreme Court's decision in Smylie v. State, 823 N.E.2d 679 (Ind. 2005), cert. denied, 126 S.Ct. 545, wherein the Court held that the rule announced in Blakely v. Washington, 542 U.S. 296 (2004) rendered Indiana's prior sentencing scheme unconstitutional. Because Schulien committed the instant offense on June 8, 2005, we apply the sentencing statutes in their amended form. See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied; Ford v. State, 755 N.E.2d 1138, 1143 (Ind. Ct. App. 2001), trans. denied.

The statutes now in effect do not provide for what was termed under the former statutes as the "presumptive sentence"; instead, the new statutory scheme provides for a sentencing range with "advisory sentences." Specifically, in its amended form Indiana Code § 35-50-2-7 (Burns Code Ed. Supp. 2006) provides in pertinent part: "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years."

felony[3] even though the total restitution requested in this case was $574.52, a fraction of the amount which serves to elevate a theft offense to a Class C felony.[4] Schulien also maintains that his sentence is inappropriate because the trial court failed to consider certain mitigating circumstances—(1) that his participation in the offense was relatively minor in that, although he participated in rummaging through the victim's car, he did not open the car or physically remove the stereo, the purse, or the camera from the car, and (2) that his incarceration would pose an undue hardship upon his disabled girlfriend and their minor child. Finally, as another basis for finding his sentence inappropriate, Schulien argues that the trial court's sentencing statement is inadequate for appellate review.

We begin by noting that Article 7, Section 14 of the Indiana Constitution authorizes an independent appellate review of imposed sentences. In addition, Indiana Appellate Rule 7(B) articulates a standard of review designed as guidance for appellate courts, providing that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Our Supreme Court has recently reiterated that this formulation "place[s] the central focus upon the role of the trial judge, while at the same time reserving for the appellate courts the chance to review sentencing decisions in a climate more distant from local clamor." Childress v.

[3] Indiana Code § 35-50-2-6 (Burns Code Ed. Supp. 2006) provides that "[a] person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years."

[4] The offense of theft is elevated to a Class C felony if the fair market value of the property is at least $100,000. See I.C. § 35-43-4-2.

State, 848 N.E.2d 1073, 1079 (Ind. 2006) (citing Serino v. State, 798 N.E.2d 852, 856-57 (Ind. 2003)). Even where the trial court meticulously follows the proper procedure in imposing the sentence, Appellate Rule 7(B) authorizes a reviewing court to revise a sentence which it concludes is inappropriate in light of the nature of the offense and character of the offender. Id. at 1079-80 (citing Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005)).

We first address Schulien's argument that his sentence is inappropriate because he essentially received a sentence authorized for a Class C felony theft when he was convicted of theft as a Class D felony. We note that the overlap among the sentencing ranges for the different classes of offenses serves to provide flexibility and allow for consideration of various factors which a trial court may use in deciding what sentence to impose for a certain class of offense given the particular case and the particular offender. Simply because Schulien was sentenced at the highest end of the range for a Class D felony, a sentence which happens to fall at the lower end of the range for a Class C felony offense, does not necessarily make his sentence inappropriate. As noted above, in deciding whether a sentence is inappropriate, we will consider the nature of the offense and the character of the offender.

Turning to the nature of the offense, we agree with Schulien that the facts of this case are not among the worst of offenses, regardless of the nature of his involvement. Our inquiry, however, does not end there. We must also consider the character of the offender. We begin by addressing Schulien's claim that imprisonment would pose an undue hardship upon his disabled girlfriend and their child, for such claim clearly falls

within our assessment of Schulien's character. We note that the record reveals that Schulien has not established paternity for the child. The record also reveals that Schulien has worked only sporadically since 1996, that his girlfriend receives over $600 a month for disability, and that their alleged child receives WIC and is on Medicaid. Given the foregoing, Schulien has not established that his incarceration would pose an undue hardship, financial or otherwise, upon his girlfriend and their alleged child. In terms of our review, Schulien, who seeks leniency based upon the existence of a child for whom he does not provide regular support, has not established why we should consider such as reflecting positively upon his character.

We now consider the most telling evidence of Schulien's character—his criminal history. From the trial court's sentencing statement, it is clear that the trial court placed particular emphasis upon Schulien's criminal history in deciding to impose the three-year maximum sentence. While we do not agree with the trial court's apparent blanket policy to impose the maximum sentence whenever a criminal defendant coming before it has a criminal history consisting of three felonies and misdemeanors,[5] we do find Schulien's criminal history relevant for what it reveals about his character and sufficiently aggravating to support the sentence imposed.

Beginning with Schulien's juvenile history, we note that Schulien was committed to the Indiana Boys School after being adjudicated a delinquent on four counts of child molesting. As an adult, Schulien has accumulated three misdemeanor convictions and

[5] In assessing the significance to afford to a defendant's criminal history, the court should consider the gravity, nature, and number of prior offenses as they relate to the current offense. Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004).

three felony convictions, including two convictions for C felony forgery and one conviction for D felony escape, the consequences for which Schulien was still serving at the time of the instant offense.[6] To be sure, at the time of the current offense, Schulien was on parole. What this reveals to us is that in recent years, Schulien has demonstrated a clear lack of respect for the law and has failed to conform his conduct to the law, despite the efforts of the justice system. We further note that efforts to extend leniency to Schulien through probation, home detention, or placement in a re-entry program have failed. Although Schulien's criminal history may not be directly related to the instant offense, it reflects poorly upon his character, and in our view, is sufficient to justify the sentence imposed.[7]

Finally, we address Schulien's argument that the trial court's sentencing statement is inadequate for appellate review. As noted above, the Indiana Constitution and Appellate Rule 7(B) provide for an independent appellate review of the sentence imposed. While a trial court's sentencing statement may be beneficial to our review, it does not restrict our authority to consider the nature of the offense and the character of the offender in deciding whether the sentence imposed is inappropriate. Likewise, an inadequate sentencing statement does not necessitate a determination that the sentence

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[6] The record reveals that in 2001 Schulien was sentenced to an aggregate term of four years imprisonment and four years of probation upon his C felony forgery convictions. After being released from incarceration and placed on probation, Schulien's probation was revoked, and he was ordered to serve his four-year suspended sentence on home detention. Schulien's home detention was later revoked, and he was ordered to serve the remainder of his sentence with the Indiana Department of Correction. Schulien was eventually placed in a re-entry program, but was dismissed from that program after being charged with escape, for which he was later convicted and sentenced.

[7] It is well settled that a single aggravating factor may support imposition of an enhanced or maximum sentence. See Berry v. State, 819 N.E.2d 443, 456 (Ind. Ct. App. 2004), trans. denied.

imposed is inappropriate. When a challenge as to the appropriateness of the sentence is made—here, Schulien's only challenge upon appeal—it remains incumbent upon this court to consider the nature of the offense and the character of the offender. Here, we have engaged in an independent review of the nature of the offense and the evidence reflecting upon Schulien's character, and, giving due deference to the trial court, we cannot conclude that imposition of the maximum three-year sentence was inappropriate.[8]

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.

[8] We recognize that in Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied, a majority found a thirty-nine-year sentence to be inappropriate where, although the majority determined that the offender's character fell within the category of worst offenders, the offense was not among the worst of offenses. Judge Mathias dissented, believing the maximum sentence was warranted given the nature of the offenses and the character of the offender. Id. at 499.

The Payton case demonstrates that reasonable minds may differ as to what constitutes an appropriate sentence. Here, we recognize that a different sentence may have been fashioned. Nevertheless, having reviewed the record, and giving due deference to the trial court, we cannot say the maximum sentence was inappropriate in light of evidence reflecting negatively upon Schulien's character.